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IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 10-0161

BNSF RAILWAY COMPANY,
Appellant/Petitioner,
vs.

CHAD CRINGLE and MONTANA DEPARTMENT OF LABOR, HUMAN RIGHTS COMMISSION,
Appellees/Respondents.

Re: District Court Case No.: BDV-2009-1016

APPELLANT'S OPENING BRIEF

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I. STATEMENT OF ISSUES

1. Did the District Court err in concluding that it had no jurisdiction to entertain BNSF's Petition seeking review of a Montana Human Rights Commission ("HRC") order dismissing BNSF's internal agency appeal as untimely?
2. Is the 14-day period for appealing to the HRC from a Hearing Officer's Decision under the Montana Human Rights Act "jurisdictional" or otherwise not subject to modification for any reason whatsoever?

II. STATEMENT OF THE CASE

BNSF is appealing the First Judicial District Court's dismissal of BNSF's Petition for Judicial Review, or, Alternatively, Petition for Writ and/or Declaratory Judgment (BNSF's "Petition"). The District Court based the dismissal on a lack of subject matter jurisdiction to consider the Petition. BNSF's Petition sought review of the HRC's October 5, 2009, Order dismissing BNSF's appeal of a September 2, 2009, Hearing Officer's Decision and denying BNSF's request for an extension of time in which to file the appeal to the HRC.

The merits of Cringle's discrimination claim against BNSF are not before this Court. BNSF's appeal is limited strictly to the two issues presented above: (1) whether the District Court erred in dismissing BNSF's Petition based on a lack

of subject matter jurisdiction; and (2) whether the District Court correctly held that the 14-day time period was "jurisdictional" or otherwise not subject to modification for any reason.

The District Court action with regard to its decision to dismiss BNSF's Petition has concluded, with the Judgment on all issues having been issued on April 9, 2010. However, pending in District Court is the District Court's filing of findings of fact, conclusions of law, and order regarding its May 21, 2010, denial of BNSF's Motion for Stay of Execution of Judgment Pending Appeal and Request for Approval of Supersedeas Bond, as directed by Order of this Court on June 22, 2010. Upon the filing of the District Court's findings, conclusions, and order, this Court will allow briefing by the parties and issue a decision on BNSF's May 28, 2010, Motion for Relief from the District Court's Order denying BNSF's motion for stay and approval of supersedeas bond.

III. STATEMENT OF RELEVANT FACTS

On July 7, 2008, Cringle filed a Charge of Discrimination with the Montana Department of Labor (the "Department") alleging that BNSF discriminated against him on the basis of his claimed disability (obesity) by requesting additional medical diagnostic information from him prior to medically qualifying him for the position of track laborer. Cringle Charge of Discrimination. BNSF App. A. A Department Hearing Officer found BNSF liable and issued a September 2, 2009,

Hearing Officer's Decision awarding damages. Hearing Officer's Dec. BNSF App. B. The substance of the discrimination claim and the Hearing Officer's Decision are not at issue in the instant appeal.

Under Mont. Code Ann. § 49-2-505(4), BNSF had 14 days from the issuance of the Hearing Officer's Decision to bring an appeal before the HRC.[1] On September 22, 2009, BNSF filed a notice of appeal with the HRC along with a request for an extension of time to appeal. BNSF's HRC Not. Appeal. BNSF App. C. BNSF's Req. Extension. BNSF App. D. On September 28, 2009, counsel for Cringle objected to BNSF's notice of appeal and request for an extension of time to appeal. Trieweiler HRC Ltr. BNSF App. E. In that letter, counsel for Cringle argued that the appeal and request for extension were untimely and that the 14-day deadline for filing an appeal to the HRC was jurisdictional. *Id*. The HRC, Cringle's counsel contended, therefore had no authority to entertain the appeal. *Id*. On October 5, 2009, without an opportunity for further argument or briefing, the HRC issued an order denying BNSF's request for an extension and dismissing its appeal. HRC Dismissal Order. BNSF App. F.

In its Dismissal Order, the HRC stated that BNSF's appeal was "untimely" and "[a]ccordingly" denied BNSF's extension request and dismissed the appeal.

[1] There is a question of whether an additional 3 days for mailing are added to the 14-day time period. However, unless Cringle or the Department raise that issue in their response briefs, BNSF does not plan to raise it on appeal since the District Court's decision did not turn on that issue, and the additional days for mailing would not have brought BNSF's notice of appeal within the 14-day period.

Id. The HRC therefore appeared to have accepted Cringle's contention that the 14-day appeal period is "jurisdictional" and that the HRC therefore lacked authority to extend the deadline. As explained below, the HRC has since confirmed that view of its authority and the rationale for the dismissal.

On November 4, 2009, BNSF filed its Petition. BNSF's Petition. BNSF App. G. In its Petition, BNSF requested that the District Court review and reverse the HRC Dismissal Order pursuant to Mont. Code Ann. § 2-4-702 or § 2-4-701. *Id*., ¶ 13. BNSF requested that the District Court (1) confirm the HRC's authority to extend the 14-day appeal period, (2) reverse the HRC's decision to deny BNSF's extension request on the ground that it lacked such authority, and (3) remand the matter to the HRC with instructions to either accept as timely BNSF's September 22, 2009, Notice of Appeal and proceed to the underlying merits or to consider in the first instance whether to grant BNSF's extension request. *Id*.

Alternatively, BSNF requested relief from the HRC Dismissal Order by way of a writ of mandate, writ of review, or other appropriate writ. *Id*., ¶ 17. As another alternative method of relief, BNSF sought declaratory relief pursuant to the Uniform Declaratory Judgments Act, Mont. Code Ann. § 27-8-101 *et. seq*. *Id*., ¶ 18.

On November 25, 2009, Cringle filed a motion to dismiss arguing that the District Court lacked jurisdiction to consider BNSF's Petition. The basis of

Cringle's argument was that the Mont. Code Ann. §49-2-505(3)(c) & (d) 14-day deadline for filing an appeal with the HRC of a Hearing Officer's decision is jurisdictional. Cringle's Mot. Dismiss, p. 4. Cringle also argued that regardless of whether the 14-day time limit is jurisdictional, BNSF had failed to exhaust its administrative remedies by not timely appealing the Hearing Officer's Decision. *Id*., p. 7. Therefore, for both reasons Cringle argued, BNSF could not request review of the Hearing Officer's Decision in District Court. *Id*. However, as will be explained throughout this brief, BNSF was not requesting review of the Hearing Officer's Decision, but was seeking review of the HRC's October 5, 2009, Order. *See* Petition, ¶ 13. Cringle's approach of focusing on the timeliness of the appeal of the Hearing Officer's Decision instead of the District Court's ability to review the HRC's Dismissal Order created the confusion that eventually led to the District Court's erroneous dismissal of BNSF's Petition.

The Department filed a similar motion to dismiss on December 8, 2009. The Department perpetuated Cringle's misdirected argument that the "final agency decision" that was the subject of review was the Hearing Officer's Decision, and not the HRC Order. The Department argued that "there is no dispute that BNSF failed to exhaust the administrative remedy (by failing to timely appeal to the HRC)." Department's Mot. Dismiss, p. 4. Therefore, the Department contended,

BNSF cannot satisfy the requisite provisions of the Montana Administrative Procedures Act ("MAPA"), and the District Court lacked jurisdiction. *Id*.

The Department also confirmed what was implicit in the HRC's Dismissal Order — that the HRC operated under the assumption that it had no authority whatsoever to grant an extension of the 14-day time period regardless of the reason for the requested extension. Department's Br. Support Mot. Dismiss, p. 5 ("BNSF boldly contends that the [HRC] had some level of discretion in dismissing BNSF's untimely appeal. But this argument seems disingenuous. The statutes are clear on their face.") In effect the Department admitted that the HRC believed that the time prescription was jurisdictional.

That same day, the Department also filed a cross petition for enforcement of the Hearing Officer's Decision. On December 14, 2009, just four business days after service of the Department's cross petition, and prior to any response from BNSF, the District Court entered an Order granting the Department's cross petition.

BNSF responded to Cringle's motion to dismiss on December 15, 2009. BNSF began its response by explaining:

> Cringle incorrectly focuses on whether this Court would have jurisdiction to review the hearing officer's decision. But the agency decision BNSF is challenging in this action is the HRC's dismissal order, which is based on the HRC's conclusion that it lacked authority to even consider modifying the 14-day period.

BNSF's Resp. Cringle's Mot. Dismiss, p. 1. BNSF went on to explain that recent case law supported its contention that the 14-day period is not jurisdictional and that the HRC, therefore, erred as a matter of law by viewing the time period as jurisdictional and failing to exercise its discretion to even consider modifying the time period. *Id*., pp. 8-14. Additionally, BNSF explained that if the 14-day filing period is not jurisdictional, it is subject to modification, and the HRC erred in denying BNSF's requested extension on the mistaken view that it had no authority to even consider BNSF's request. *Id*., 14-19.

Having witnessed the ease of success of the Department's cross petition, on December 16, 2009, Cringle filed his own cross petition for enforcement of the Hearing Officer's Decision. BNSF immediately answered Cringle's cross petition on December 18, 2009.

BNSF filed a response to the Department's motion to dismiss on December 23, 2009. BNSF responded first to the Department's lack of jurisdiction argument, that mirrored closely Cringle's argument. BNSF's Resp. Department's Mot. Dismiss 3:19 – 7:23. BNSF next explained that the HRC does have the authority to extend the 14-day filing period. *Id*., 7:24 – 10:22. Finally, BNSF described how the District Court had jurisdiction to entertain BNSF's Petition by way of BNSF's alternative requests for relief via a writ of mandate, writ of review, other appropriate writ, or declaratory judgment. 11:1 – 15:2.

BNSF next filed a motion to reconsider the District Court's Order granting the Department's cross petition on December 31, 2009, based in part on the District Court's granting of the cross petition with no prior notice to BNSF or opportunity for it to be heard. The Department never responded to BNSF's motion to reconsider. Cringle filed a reply in support of his motion to dismiss on January 14, 2010.

A hearing on all pending motions was held February 25, 2010. On March 15, 2010, the District Court entered an Order (the "Original Order") dismissing BNSF's Petition, along with the cross petitions of both Cringle and the Department based on a lack of subject matter jurisdiction to consider any of the matters. Original Order. BNSF App. H. On March 23, 2010, Cringle filed a Rule 60(b), M.R.Civ.P., motion for partial relief from the Original Order, arguing that the District Court *did* have subject matter jurisdiction to consider Cringle's and the Department's cross petitions for enforcement, but still lacked subject matter jurisdiction to consider BNSF's Petition. On March 29, 2010, again just 4 business days after the filing of Cringle's Rule 60(b) motion, and prior to any response from BNSF, the District Court issued a *Nunc Pro Tunc* Order granting Cringle's and the Department's cross petitions for enforcement (the latter of which the District Court had already granted), but still denying BNSF's Petition based on a lack of subject matter jurisdiction. *Nunc Pro Tunc* Order. BNSF App. I.

BNSF filed its notice of appeal with this Court on March 30, 2010, prior to BNSF's receipt of the *Nunc Pro Tunc* Order, and specifically appealed the District Court's March 15, 2010, Original Order. Upon receipt of the *Nunc Pro Tunc* Order, BNSF immediately filed an amended notice of appeal on March 31, 2010, appealing the *Nunc Pro Tunc* Order and, to the extent the *Nunc Pro Tunc* Order did not fully supersede the Original Order, the Original Order as well. Judgment was ultimately entered in Cringle and the Department's favor on April 9, 2010. Judgment. BNSF App. J. As a precautionary measure, BNSF filed a second amended notice of appeal on April 29, 2010, referencing the April 9 Judgment.

IV. STANDARD OF REVIEW

The District Court dismissed BNSF's Petition for lack of jurisdiction. The standard of review for a district court's determination that it lacks subject matter jurisdiction is de novo. *Koeplin v. Crandall*, 2010 MT 70, ¶ 7, 355 Mont. 510, ¶ 7, 230 P.3d 797, ¶ 7. A motion to dismiss should be construed in a light most favorable to the non-moving party and should not be granted unless it appears beyond a doubt that the non-moving party can prove no set of facts in support of its claim which would entitle it to relief. *Public Lands Access Ass'n, Inc. v. Jones*, 2008 MT 12, ¶ 9, 341 Mont. 111, ¶ 9, 176 P.3d 1005, ¶ 9. When deciding a motion to dismiss based upon a lack of subject matter jurisdiction, the district court must determine whether the complaint, or in this case the Petition, states facts that,

if true, would vest the court with subject matter jurisdiction. *Morigeau v. Gorman*, 2010 MT 36, ¶ 7, 355 Mont. 225, ¶ 7, 225 P.3d 1260, ¶ 7.

V. ARGUMENT

A. Summary of the Argument

This Court should reverse the District Court's *Nunc Pro Tunc* Order and Judgment because the District Court erred in concluding that it did not have subject matter jurisdiction to consider BNSF's Petition. This Court should hold that the 14-day time period found in Mont. Code Ann. § 49-2-505 for appealing to the HRC from a Hearing Officer's Decision is not "jurisdictional" and that the HRC is obligated to consider the merits of BNSF's request for an extension of time in which to file an appeal under the HRC's normal procedural rules.

The District Court's conclusion that it lacked subject matter jurisdiction was based on an incorrect premise — that BNSF was seeking review of the Hearing Officer's Decision, not the HRC's October 5, 2009, Dismissal Order. The District Court *must* possess subject matter jurisdiction to determine whether the HRC erred in its October 5, 2009, Dismissal Order. That Dismissal Order was based solely on the HRC's decision that it lacks the authority to extend the 14-day filing period. Because the HRC is not authorized to define its own jurisdiction, a court must be permitted to review that decision. Jurisdiction to do so arises from the ordinary means for reviewing a final agency decision (Mont. Code Ann. § 49-2-505(9)),

MAPA's provision regarding review of procedural determinations (Mont. Code Ann. § 2-4-701), and the District Court's authority to issue a writ of review, writ of mandate, other appropriate writ, or declaratory judgment.

Additionally, the District Court erred in its conclusion that the 14-day time period is "jurisdictional" or otherwise not subject to modification. The time period is *not* jurisdictional, as recent cases from this Court establish, and is therefore subject to modification. The District Court had the authority to and should have compelled the HRC to exercise its discretion to consider BNSF's notice of appeal and attendant request for extension rather than reject them because of a mistaken view about the nature of the 14-day period.

B. The District Court Erred in Dismissing BNSF's Petition Based on a Lack of Subject Matter Jurisdiction

Construing the facts in the light most favorable to BNSF, BNSF's Petition states facts that, if true, would vest the court with subject matter jurisdiction. *Public Lands Access Ass'n*, ¶ 9; *Morigeau*, ¶ 7. The District Court had subject matter jurisdiction to review the HRC's Order denying BNSF's request for an extension of time to file its internal appeal and dismissing BNSF's appeal. BNSF respectfully requests the District Court's decision finding otherwise be reversed.

1. The District Court Ruled On the Wrong Agency Decision

The most glaring error of the District Court was focusing on the wrong agency decision in coming to its conclusion. That is, the District Court focused on

whether it could entertain a challenge by BNSF to the Hearing Officer's Decision even though BNSF had not appealed to the HRC within the 14-day filing period. As has already been discussed, both Cringle and the Department led the Court in that direction throughout their briefing. However, BNSF was seeking review of the HRC's October 5, 2009, Dismissal Order, not the Hearing Officer's Decision.

BNSF's Petition expressly limited its request for review to the HRC's Dismissal Order. The very first sentence of BNSF's Petition reads, "COMES NOW Petitioner, BNSF Railway Company ("BNSF") and files this Petition seeking judicial review of the Montana Human Rights Commission's October 5, 2009, Order denying BNSF's request for an extension to file an appeal and dismissing BNSF's appeal (the "Order")." Petition 1:17-21. Note that the term "Order" is defined as the October 5, 2009, Dismissal Order. *Id*. Paragraph 13 of the Petition begins by stating, "BNSF requests that the Court review and reverse the Order pursuant to Mont. Code Ann. § 2-4-702 or § 2-4-701." *Id*., 4:4-6.

By way of further example, in its response to Cringle's Motion to Dismiss, BNSF's "Argument" section started as follows:

> Cringle's entire rationale for seeking dismissal is misplaced. He refuses to focus on the order of which BNSF is seeking review — the HRC's October 5, 2009 order denying BNSF's request for an extension and dismissing BNSF's appeal. Cringle instead relies on a statutory provision he says denies this Court jurisdiction to review the hearing officer's decision. *See* Mont. Code Ann. § 49-2-505(3)(c). But that is not the question here because BNSF is not currently

> seeking review of the hearing officer's decision. And contrary to Cringle's suggestion in his response to BNSF's motion to stay, that is not because of a nefarious motive by BNSF to avoid review of the merits of the hearing officer's decision: it is because the HRC has not yet reviewed the hearing officer's decision, and this action is intended to bring about such review.

BNSF's Resp. Cringle's Mot. Dismiss, p. 6 (Dec. 16, 2009). Likewise, in response to the Department's Motion to Dismiss, BNSF explained:

> The Department is not clear about what document it contends is the "final order" at issue. At times, the Department, like Cringle, plainly assumes that BNSF is seeking review of the underlying Hearing Officer's Decision. Again, however, at this time BNSF is requesting the Court to review the HRC's October 5, 2009, Order dismissing BNSF's appeal and denying its request to extend the appeal filing period. BNSF is not at this time requesting review of the September 22, 2009, Hearing Officer's Decision.

BNSF's Resp. Department's Mot. Dismiss 4:1-7.

At the February 25, 2010, District Court hearing on pending motions, BNSF reiterated that it was appealing the October 5, 2009, HRC Dismissal Order, not the September 2, 2009, Hearing Officer Decision:

> And one thing that also needs to be clear is that BNSF is not appealing the hearing examiner's September 2nd, 2009, decision. . . . It is the October 5th, 2009, order dismissing BNSF's appeal as untimely that is being requested for review at this time.

Hearing Trans. 21:8-17 (Feb. 25, 2010) (pertinent portions attached as BNSF App. K).

Despite BNSF's repeated clarifications as to what order was being appealed, the District Court was still lured by Appellees into dismissing BNSF's Petition

based on a perceived lack of subject matter jurisdiction to review the Hearing Officer's Decision. The District Court stated:

> The legislature has limited this Court's jurisdiction of DOLI decisions by requiring that they be appealed to the HRC within fourteen days. Section 49-2-503(3)(c) [sic.], MCA. This Court does not have jurisdiction and Spear's[2] decision is final.

Original Order 4:21-24; *Nunc Pro Tunc* Order 4:25 – 5:3. Later, in the District Court's "Conclusion" section, the District Court removed any doubt about its rationale:

> Based on the above, this Court lacks subject matter jurisdiction of this action. Because BNSF failed to appeal Spear's decision to the HRC within fourteen days, it became a final non-appealable decision under Section 49-2-503(3)(c) [sic.], MCA, and BNSF is bound by that decision.

Original Order 5:2-5; *Nunc Pro Tunc* Order 6:2-5.

The District Court erred in focusing on the wrong agency order in determining whether it had subject matter jurisdiction over BNSF's Petition. BNSF's Petition sought review of the HRC's Dismissal Order. Yet the Court dismissed the action based on its finding that it had no jurisdiction to review the Hearing Officer's Decision. As discussed below, the District Court clearly had subject matter jurisdiction to consider BNSF's challenge to the Dismissal Order.

[2] "Spear" refers to Terry Spear, the Hearing Officer who drafted the September 2, 2009, Hearing Officer's Decision. *See* Hearing Officer's Order.

2. The District Court Had Subject Matter Jurisdiction to Review the HRC's October 5, 2009, Dismissal Order

Neither Cringle nor the Department have cited any authority to suggest that the District Court did not have jurisdiction to review the HRC's Dismissal Order. This is because the law demonstrates that the District Court did have authority to review the Dismissal Order. In fact, if the District Court could not review the Dismissal Order, then the HRC's actions would not be subject to review at all, which cannot be the case.

a. Montana Code Annotated §§ 49-2-505(9) and 2-4-702

A party is permitted to seek review of a final agency decision of the HRC by filing a petition for judicial review with the District Court within 30 days of the decision. Mont. Code Ann. § 49-2-505(9). BNSF filed its Petition on November 2, 2009, within 30 days of the October 5, 2009, HRC Order. *See* BNSF Petition. The HRC's administrative rules provide that "[t]he final decision of the HRC is the final agency decision." Rule 24.9.123(13), ARM. The HRC's dismissal Order was the final decision of the HRC and is, therefore pursuant to the Administrative Rule, "the final agency decision." The analysis can end there. Under Mont. Code Ann. § 49-2-505(9), the District Court had subject matter jurisdiction to consider BNSF's Petition and the District Court's dismissal of BNSF's Petition for lack of jurisdiction should be reversed.

Cringle or the Department might respond that because Mont. Code Ann. § 49-2-505(9) refers to Mont. Code Ann. § 2-4-702, which, in turn, allows for review by "a person who has exhausted all administrative remedies within the agency," the Court may not review the HRC Dismissal Order because BNSF did not exhaust its administrative remedies. That argument, however, also again focuses on the wrong agency order. Although BNSF may not have "exhausted all administrative remedies" with regard to the Hearing Officer's Decision at this time, BNSF has done so with regard to the HRC's Dismissal Order. There is no further administrative review available to BNSF concerning the HRC's Dismissal Order. Accordingly, BNSF has exhausted its administrative remedies with regard to the only Order of which it seeks review — the October 5, 2009, HRC Dismissal Order — and Mont. Code Ann. § 2-4-702 and § 49-2-505(9) together provide the District Court with authority to review that Order.[3]

[3] The same is true as to Cringle's argument based on, and the District Court's reference to, *Shoemaker v. Denke*, 2004 MT 11, 319 Mont. 238, 84 P.3d 4. *See Nunc Pro Tunc* Order at 4. In citing *Shoemaker* as support for dismissing an appeal when the petitioner has not exhausted administrative remedies, the District Court and Cringle again focused on the wrong order as though BNSF were trying to obtain judicial review of the Hearing Officer's Decision, which *is* what the appellant in *Shoemaker* was seeking. Shoemaker also is inapposite because, even assuming that it would be decided the same way today given the more recent trend away from dismissing based on minor procedural failings, the Court in *Shoemaker* was careful to point out that "at no time did [Denke] object to the briefing deadlines or request an extension of time from the HRC . . . ." *Shoemaker*, ¶ 28. BNSF, of course, did request an extension.

b. Montana Code Annotated § 2-4-701

Even if the District Court could not review the HRC Dismissal Order pursuant to the ordinary method of review set out in Mont. Code Ann. § 49-2-505(9), MAPA provides an alternative method for the type of Order at issue here. Specifically, Mont. Code Ann. § 2-4-701 states that a "preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy." Mont. Code Ann. § 2-4-701 (emphasis added). Although the statute plainly permits review of the specified orders before a final order is issued, nothing in it purports to provide for such review *only* before issuance of a final order. Indeed, the use of the word "or" makes clear that the section is not limited to "preliminary" and "intermediate" actions. The Legislature could easily have written that section to state that it applies only before issuance of a final agency decision, but it did not.

The HRC's Dismissal Order, which includes and is based on the HRC's denial of BNSF's request to extend the 14-day filing period, is plainly a "procedural" ruling as described in Mont. Code Ann. § 2-4-701. *Id.* The only remaining question is whether review of the final agency decision would or would not provide an adequate remedy. If this Court rejects BNSF's argument that the District Court had authority to review the HRC Dismissal Order under Mont. Code Ann. § 49-2-505(9), then necessarily review of the Dismissal Order as a final

agency decision "would not provide an adequate remedy," Mont. Code Ann. § 2-4-701.

Mont. Code Ann. § 2-4-701 therefore also provided the District Court with subject matter jurisdiction to consider BNSF's Petition for review of the HRC's Dismissal Order. The District Court's dismissal of BNSF's Petition should be reversed.

c. Writ of Review, Writ of Mandate, Other Appropriate Writ, or Declaratory Judgment

There is no question that even if the District Court does not possess jurisdiction to review the HRC's Dismissal Order by way of either Mont. Code Ann. § 49-2-505(9) or § 2-4-701, the District Court *does* have jurisdiction to review it under a writ of review, writ of mandate, other appropriate writ, or declaratory judgment. Each of these alternative grounds for relief is included in BNSF's Petition. BNSF's Petition ¶¶ 17-18.[4]

(1). Writ of Review.

"A writ of review may be granted by . . . the district court . . . when a lower tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction of the tribunal, board, or officer and there is no appeal or, in the judgment of the court, any plain, speedy, and adequate remedy." Mont. Code Ann.

[4] MAPA expressly provides that it "does not limit use of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by statute." Mont. Code Ann. § 2-4-702(1)(a).

§ 27-25-102. "A writ of review is a discretionary writ issued by the Supreme Court or a district court, directed to an inferior tribunal. The purpose of the writ is to determine whether the inferior court exceeded its jurisdiction." *Shiplet v. Egeland*, 2001 MT 21, ¶ 5, 304 Mont. 141, ¶ 5, 18 P.3d 1001, ¶ 5. To obtain the writ, BNSF must show that (1) the HRC was exercising a judicial function; (2) the HRC exceeded its jurisdiction; and (3) there is no appeal or there is no plain, speedy and adequate remedy. *Id.*; *see also State ex rel. Shea v. Judicial Standards Commission*, 198 Mont. 15, 25, 643 P.2d 210, 216 (1982).

Each element is met. First, there is no question that the HRC was exercising a judicial function. The HRC's role is to hear appeals from decisions arising from the Department's hearings bureau, which functions as a trial court. Rule 24.9.102, ARM ("The commission will conduct informal hearings on objections to the dismissal of complaints by the Human Rights Bureau and appeals of Hearings Bureau decisions."). In that capacity, the HRC refused to consider BNSF's request for an extension of the appeal time and dismissed BNSF's appeal. That action was the exercise of a judicial function. Mont. Code Ann. § 2-15-1706 ("The commission is designated as a quasi-judicial board for the purposes of 2-15-124 . . . ."); [5] *see also State ex rel. Shea*, 198 Mont. at 25, 643 P.2d at 216 (Judicial

[5] A "quasi-judicial function" is "an adjudicatory function exercised by an agency, involving the exercise of judgment and discretion in making determinations in controversies" and includes "interpreting, applying, and enforcing existing rules

Standards Commission exercised judicial functions for purposes of writ of mandate determination).

Second, in holding that it lacked authority to extend the 14-day filing period the HRC exceeded its own jurisdiction. The Legislature, not the HRC establishes the HRC's authority. *Mont. Soc't of Anesthesiologists v. Mont. Bd. of Nursing*, 2007 MT 290, ¶ 43, 339 Mont. 472, ¶ 43, 171 P. 3d 704 ("An administrative agency can exercise only those powers specifically conferred on it by the Legislature."). By purporting to define its own authority and thereby refuse to consider a request it, under BNSF's view, has authority to grant, the HRC exceeded its jurisdiction.

The United States Supreme Court made that point recently in *Union Pacific R. Co. v. Locomotive Engineers and Trainmen Gen. Comm. of Adjustment, Central Region*, 130 S.Ct. 584, 175 L. Ed. 428 (2009). There, the Supreme Court held that a federal agency exceeded its jurisdiction by wrongly treating procedural issues as jurisdictional: "By refusing to adjudicate cases on the false premise that it lacked power to hear them, the NRAB panel failed 'to conform, or confine itself,' to the jurisdiction Congress gave it. We therefore affirm the judgment of the Court of Appeals for the Seventh Circuit [setting aside the NRAB's dismissal orders]." *Union Pacific*, 130 S.Ct. at 589, 175 L. Ed. at 435.

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and laws" and "determining rights and interests of adverse parties." Mont. Code Ann. § 2-15-102(10).

Third, Cringle's and the Department's views are that the District Court cannot review the HRC's Dismissal Order under MAPA. Although BNSF disagrees, if the Court accepts their position, then necessarily, there is no appeal and there is no plain, speedy and adequate remedy. Accordingly, a writ of review is appropriate.

(2). Writ of Mandate.

A writ of mandate likewise would be appropriate. The Department argued that BNSF must show that the HRC acted unlawfully in dismissing BNSF's appeal. *See* Department's Br. Support Mot. Dismiss, p. 5. That is exactly what BNSF is arguing: the HRC had authority to consider BNSF's request for an extension of time but refused to do so on the mistaken belief that it lacked such authority. If the Department is correct in arguing that there is no review of that agency action pursuant to MAPA, then a writ of mandate is appropriate to compel it to exercise its authority. *See* Mont. Code Ann. § 27-26-102; *Common Cause of Montana v. Argenbright*, 276 Mont. 382, 389-93, 917 P.2d 425, 429-31 (1996) (reversing dismissal of action for writ of mandate to compel agency to exercise discretion; holding that where agency has discretion, its refusal to exercise the discretion is subject to challenge by writ of mandate when MAPA does not provide for review).

(3). Declaratory Judgment.

BNSF further sought alternative relief by way of a declaratory judgment. BNSF's Petition, ¶ 18. In its Motion to Dismiss, the Department alleged without any supporting authority that declaratory relief is not appropriate "unless the Court intends on declaring portions of the Montana Human Rights Act unconstitutional." Department's Br. Support Mot. Dismiss, p. 6. The Department is mistaken.

First, the declaratory judgment statute expressly provides for the determination of legal rights:

> Any person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

Mont. Code Ann. § 27-8-202. There is clearly a legal dispute — whether the HRC has the authority to extend the 14-day filing period. Neither Cringle nor the Department offers an explanation for why the Court cannot decide that legal question as part of a declaratory judgment request. That is precisely the issue as to which BNSF asked for declaratory relief. BNSF's Petition ¶ 18 ("BNSF seeks a declaration that the HRC has the authority to extend the deadline for an appeal from a hearing examiner's decision to the HRC, that the HRC acted unlawfully and

without authority in apparently concluding otherwise and in denying BNSF's requested extension under the circumstances described above.").

Second, BNSF does not understand the Department's suggestion that the ability to grant declaratory relief is limited to constitutional issues. But *if* the Department is correct that the Human Rights Act allows the HRC to decide for itself that it has no authority to consider requests for extension of the 14-day period *and* that the HRC's Dismissal Order and corresponding self-imposed limitation on its authority is completely unreviewable by a court under any mechanism, then the portion of the Human Rights Act allowing that scenario is indeed unconstitutional. *See Vainio v. Brookshire*, 258 Mont. 273, 277, 852 P.2d 596, 599 (1993) (pointing to availability of judicial review as basis for upholding constitutionality of Human Rights Act's placement of decision making authority in the HRC). Plainly, however, there is no such limitation on declaratory relief, and thus there is no need to address that constitutional issue. The Court need only hold that the declaratory judgment mechanism was a permissible means for BNSF to seek review of the HRC's determination that it has no authority to extend the 14-day filing period at issue.

In sum, the District Court's subject matter jurisdiction to review the HRC's October 5, 2009, Dismissal Order under some mechanism is without question. It had such jurisdiction under Mont. Code Ann. § 49-2-505(9) and 2-4-702.

Alternatively, Mont. Code Ann. § 2-4-701 supplied jurisdiction. Finally, the District Court had jurisdiction to issue a writ of review, writ of mandate, other appropriate writ, or declaratory judgment. BNSF's concern is not so much with which method permitted the District Court to review the HRC's Dismissal Order but with the District Court's decision dismissing a request to review that Order for lack of jurisdiction. But for the District Court's confusion about which order was at issue, it would appear that the District Court adopted the Department's position that the HRC can decide for itself that it lacks authority to extend the 14-day statutory filing period and no court anywhere or anytime can review that legal determination. But judicial review is a critical part of the administrative process, indeed the part that makes the process constitutional. *Vainio*, 258 Mont. at 277, 852 P.2d at 599. The District Court erred in holding that it lacked jurisdiction to review the HRC's Dismissal Order. Construing the facts in the light most favorable to BNSF, BNSF's Petition states facts that, if true, would certainly vest the Court with subject matter jurisdiction. The District Court's dismissal should be reversed.

C. The 14-Day Filing Time Period for Appeals to the HRC is Not Jurisdictional and the HRC Was Required to Consider BNSF's Notice of Appeal and Request for Extension

Although the District Court dismissed BNSF's Petition based on a lack of subject matter jurisdiction by focusing on the wrong order, the Court also held that

the 14-day filing period could not be extended. The District Court's order indicates that it viewed the 14-day period as jurisdictional. The District Court also ruled, however: "Whether the fourteen-day period is considered 'jurisdictional' and therefore binding, or 'categorical,' as BNSF argues and not binding, the HRC cannot be compelled by this Court to expand the fourteen-period [sic.] set forth in the statute." Original Order 4:19-21; *Nunc Pro Tunc* Order 4:23-25. That approach tracked an argument Cringle made, but it is erroneous. The differentiation between whether the 14-day time period is "jurisdictional" or "categorical" is key to the analysis of this matter. Because the time period is not "jurisdictional," it can be extended, and the District Court therefore had the authority to and should have compelled the HRC to exercise the discretion it has by considering the merits of BNSF's request for extension. This Court should hold that the 14-day period is not jurisdictional and, whether characterized as "categorical" or otherwise, the HRC has the authority to extend the deadline.

1. <u>The Trend Away from "Jurisdictional" Statutory Requirements</u>

Both this Court and the U.S. Supreme Court in recent years have recognized the persistent misuse of the term "jurisdictional" in cases addressing various statutory requirements. Applying the more recent cases here leaves no doubt that the 14-day filing period is not jurisdictional.

In *Miller v. 18th Jud. Dist. Ct.*, 2007 MT 149, 337 Mont. 488, 162 P.3d 121, the Court explained in detail the misuse of the term "jurisdictional" in many cases. ¶¶ 43-47; *see also State v. Clark*, 2008 MT 317, ¶¶ 19-32, 346 Mont. 80, ¶¶ 19-32, 193 P.3d 934, ¶¶ 19-32 ("statutory time limitations are not necessarily jurisdictional") (Nelson, J., specially concurring). Relying on U.S. Supreme Court decisions such as *Kontrick v. Ryan*, 540 U.S. 443, 124 S.Ct. 906 (2004), and *Eberhart v. U.S.*, 546 U.S. 12, 126 S.Ct. 403 (2005), and prior Montana Supreme Court decisions such as *DeShields v. State*, 2006 MT 58, 331 Mont. 329, 132 P.3d 540, *Miller* explained that "subject matter jurisdiction . . . 'involves the fundamental power and authority of a court to determine and hear an issue.'" *Miller*, ¶ 43 (quoting *Stanley v. Lemire*, 2006 MT 304, ¶ 30, 334 Mont. 489, ¶ 30, 148 P.3d 643, ¶ 30). As such, the Court held, "a provision is properly characterized as 'jurisdictional' if it 'deliniat[es] the classes of cases (subject-matter jurisdiction) . . . falling within a court's adjudicatory authority.'" *Id*. (quoting *Kontrick*, 540 U.S. at 455, 124 S.Ct. at 915).

The Court emphasized the importance of not confusing jurisdictional provisions with "categorical time prescriptions." "Categorical time prescriptions, by contrast, are 'inflexible' or 'rigid' — but nonjurisdictional — claim-processing rules." *Id*., ¶ 44 (quoting *Kontrick*, 540 U.S. at 454-55, 124 S.Ct. at 915; *Eberhart*, 546 U.S. at 19, 126 S.Ct. at 407). A time period may be a "categorical time

prescription" if the applicable language is written in mandatory language such as "shall" rather than discretionary language such as "may" or "should." *Id*., ¶¶ 39, 46.

Applying those principles, this Court held that the rule requiring notice of the state's intent to seek the death penalty within 60 days after arraignment was not jurisdictional. The Court emphasized that the rule did not "speak in jurisdictional terms" because it did not "purport to delineate a class (i.e., the subject matter) of cases falling within the district courts' adjudicatory authority." *Id.*, ¶ 45. Nor did it "purport to 'withdraw' the district courts' jurisdiction over death penalty cases." *Id.* Instead, the Court held, the time limit was a "categorical time prescription" because it was written using the mandatory term "shall." *Id.*, ¶¶ 39, 46.

The following year, this Court applied *Miller* to the one-year time bar on post-conviction relief set out in Mont. Code Ann. § 46-21-102. *Davis v. State*, 2008 MT 226, 344 Mont. 300, 187 P.3d 654. There, Davis filed a motion asking the Court to equitably toll the one-year filing period, which had expired before he filed the motion. The District Court denied the motion on the ground that the one-year period was jurisdictional. *Id.* ¶¶ 8-10. This Court reversed, overruling *Pena v. State*, 2004 MT 293, 323 Mont. 347, 100 P.3d 154, which had expressly held that the one-year period was jurisdictional. *Davis*, ¶¶ 12-23.

In doing so, the Court examined federal law, including *Eberhart*, and cases from other states holding that various filing periods were not jurisdictional. *Id.* Based on that reasoning, the Court held that *Pena* and related cases "lack[ed] compelling reasoning or support for the proposition that § 46-21-102 . . . limits a district court's subject matter jurisdiction." *Id.*, ¶ 16. The Court specifically rejected the reasoning in *Pena* that because "'courts cannot provide more rights [] than granted by statute, the statutory rules which circumscribe the post[-] conviction relief process are jurisdictional in nature.'" *Id.*, ¶¶ 16-17.

The Court explained that by asking the Court to treat the one-year period as jurisdictional, the state was asserting "that a petitioner may dictate a court's subject matter jurisdiction on the timeliness of his petition." *Id.*, ¶ 21. Yet subject matter jurisdiction, the Court explained, "'cannot be expanded to account for the parties' litigation conduct.'" *Id.* (quoting *Kontrick*, 540 U.S. at 456). The Court rejected the notion that a district court's "power" to entertain a post-conviction petition hinged on the timeliness of the petition. *Id.*

In the end, this Court recognized — just as the U.S. Supreme Court had recently acknowledged regarding its own cases — that the Court had "been less than meticulous in its use of the term 'jurisdictional.'" *Id.*, ¶ 23 (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 511, 126 S.Ct. 1235, 1242 (2006)); *see also Steab v. Luna*, 2010 MT 125, ¶24, 356 Mont. 372, ¶24, ___ P.3d ___, ¶24 ("In recent years

we have sought to correct the misuse of the term 'jurisdiction . . . .'"). The Court accordingly concluded that Mont. Code Ann. § 46-21-102 "does not circumscribe a district court's subject matter jurisdiction" but instead was a "categorical time prescription." *Id.*, ¶ 23. The Court therefore overruled *Pena* and other cases that "held that the Legislature limited district courts' subject matter jurisdiction by codifying a one-year time bar on post-conviction relief." *Id.*

Davis establishes that the 14-day period at issue in this case is not jurisdictional. The 14-day period does not "speak in jurisdictional terms" because it does not "purport to delineate a class (i.e., the subject matter) of cases falling within the [HRC's] adjudicatory authority." *Miller.*, ¶ 45. Nor does it "purport to 'withdraw' the [HRC's] jurisdiction over [hearing officer decisions]." Indeed, the provision is not even written in mandatory terms. It simply says that "[a] party may appeal a decision of the hearings officer by filing an appeal with the commission within 14 days . . . ." Mont. Code Ann. § 49-2-505(4).

BNSF recognizes that Cringle and the Department rely on language in Mont. Code Ann. § 49-2-505(3)(c) stating that if a hearing officer's decision is not appealed to the HRC, the decision "becomes final and is not appealable to district court." Mont. Code Ann. 49-2-505(3)(c). But providing that an order is not appealable to court is a restriction on what a litigant may do. The provision does not purport to deprive a court of the *power* to review hearing officer decisions.

Nor does it purport to describe a subject matter of cases that district courts have no authority to adjudicate. *Miller*, ¶ 45. And most critically, the Court in *Davis* quite plainly rejected the notion that a court's jurisdiction could be "expanded to account for the parties' litigation conduct," including a failure to file on time. *Davis*, ¶ 21. Indeed, after *Davis* it is questionable whether *any* statutory time period is jurisdictional. Under *Davis* and the other cases just discussed, the 14-day period here is not jurisdictional.

2. <u>The 14-Day Period is Subject to Extension</u>

Davis also establishes that the consequence of the 14-day period not being jurisdictional is that the period may be extended for appropriate reasons. In *Davis*, the Court held that *because* the one-year time bar was not jurisdictional, the district court had erred in refusing to rule on Davis's motion for equitable tolling of the time period and remanded the case for consideration of the motion. *Id.*, ¶¶ 23, 25. Thus, *Davis* establishes the District Court's comment that the time period could not be extended "[w]hether the fourteen-day period is considered 'jurisdictional' and therefore binding, or 'categorical,'" Original Order 4:19-21; *Nunc Pro Tunc Order* 4:23-25, is incorrect. That the period is not jurisdictional *means* that it can be modified on appropriate grounds.

That is the normal rule in federal courts as well, which routinely consider equitable modification of the procedural time limits involved in discrimination

cases. In *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982), for example, the U.S. Supreme Court held that the time period for filing a charge with the EEOC was subject to modification because it was not jurisdictional. Courts likewise have held that the 90-day period for filing a lawsuit after EEOC's investigation and issuance of a dismissal is subject to modification. *See, e.g.*, *Valenzuela v. Kraft, Inc.*, 801 F.2d 1170, 1172-74 (9th Cir. 1986) (reviewing various federal cases and concluding that the 90-day period is subject to equitable modification). Montana likewise has been amenable to modification of certain deadlines under the Human Rights Act. *Harrison v. Chance*, 244 Mont. 215, 228, 797 P.2d 200, 208 (1990) (noting that Montana Supreme Court has "looked favorably upon the doctrine of equitable tolling" and that plaintiff may be able to re-file her untimely complaint with the HRC); *see also Lozeau v. Geico Indemnity Co.*, 2009 MT 136, ¶ 21, 350 Mont. 320, ¶ 21, 207 P.3d 316, ¶ 21 (reversing refusal to apply equitable tolling in negligence case).

Further, in the federal system where agency adjudication is the norm, there is a presumption that filing periods are subject to equitable modification. Based on that presumption, courts have held that the time period for seeking review by one agency of another agency's actions is subject to equitable modification. *See Kirkendall v. Department of Army*, 479 F.3d 830, (Fed. Cir. 2007) (en banc) (time period for appeal from Department of Labor to Merit Systems Protection Board,

which was to be "in no event . . . later than 15 days after" receipt of notice, was not mandatory and jurisdictional, and thus was subject to equitable tolling). The time periods in all of those cases are just as explicit and direct as the 14-day filing period at issue here, and yet the courts reviewing those time periods have held that they are subject to modification on appropriate grounds, just as this Court did in *Davis*.

Determining what standard applies to the HRC's extension of the 14-day period is beyond the scope of this appeal because the HRC rejected the request solely on the ground that it lacked authority to extend the time period. But BNSF notes that there are two permissible grounds for modification. First, a time period may be modified on general equitable grounds such as those raised in *Davis* where the petitioner sought to equitably toll the one-year filing period. Second, in this case the applicable administrative regulations provide a standard. Rule 24.9.113(3), ARM states:

> Except as to dates fixed by statute and not subject to modification, the commission may enlarge the time to perform an act. In accordance with Rule 6(b) of the Montana Rules of Civil Procedure, the time may be enlarged for good cause shown.

Curiously, the District Court cited that same rule in holding that the HRC does *not* have the authority to extend the 14-day period. *Nunc Pro Tunc* Order at 4. Yet, although the 14-day period may be "fixed by statute" nothing in the statute

indicates that it is "not subject to modification." *Cf.* Mont. R. Civ. P. 6(b) (prohibiting an extension of time for certain post-judgment motions).

3. Even if "Jurisdictional," the HRC was Not Deprived of Jurisdiction and Had No Authority to Dismiss.

Even if the 14-day time limit were a "jurisdictional" limitation on seeking judicial review of a Hearing Officer's Decision, it says nothing about whether failing to file an appeal to the HRC within 14 days deprives *the HRC* of jurisdiction. There is no language providing that the HRC lacks jurisdiction to review, or otherwise is prohibited from reviewing, an untimely appeal. *Cf.* (former) Mont. Code Ann. § 49-2-501 ("Any complaint not filed within the times set forth in this section may not be considered by the commission or the department."), *modified by* H.B. 76, 60th Leg., 2007. Nor is there language requiring the HRC to dismiss an untimely appeal. *Cf.* Mont. Code Ann. § 49-2-501(5) ("If the department determines that the complaint is untimely, it shall dismiss the complaint . . . ."). There simply is no credible argument that failing to file an appeal within 14 days deprives the HRC of jurisdiction.

In fact, the statute does not even *allow* the HRC to dismiss an untimely appeal. After stating that "[a] party may appeal" to the HRC, the statute says:

> The commission *shall hear all appeals* within 120 days of receipt of an appeal. The commission may *affirm, reject, or modify the decision* in whole or in part. The commission shall render a final agency decision within 90 days *of hearing the appeal*.

Mont. Code Ann. § 49-2-505(4) (emphasis added). The plain language of the statute requires the HRC to "hear all appeals" and allows the HRC to "affirm, reject, or modify" the hearing officer's decision — not dismiss the appeal — and to render a final decision within 90 days of "hearing the appeal." *Id.* Nowhere does it allow the HRC to attempt to cut off a party's administrative-exhaustion efforts by throwing out an appeal on untimeliness or any other grounds. The HRC is not a court and cannot place itself in the role of final adjudicator of claims. *See Vainio*, 258 Mont. at 277, 852 P.2d at 599 (pointing to availability of judicial review as basis for upholding constitutionality of Human Rights Act's placement of decision making authority in the HRC). *If* — unlikely as it is after *Davis* — the 14-day period is jurisdictional with regard to court review, that is a decision to be made by a court, if necessary, *after* the HRC has fulfilled its statutory responsibility of reviewing the merits of the hearing officer's decision.

4. The District Court has the Power to Order the HRC to Comply with the Statute.

Contrary to the District Court's assertion that it is powerless to order the HRC to at least consider BNSF's notice of appeal and motion for additional time, there can be no question that the District Court does have the power to order the HRC to comply with its statutory responsibilities, either by way of reviewing the improper dismissal order or by issuance of an appropriate writ or declaratory relief.

Cringle and the Department's motions to dismiss relied on a discarded approach to construing statutory time periods. This Court recently has been revisiting its treatment of statutory requirements as jurisdictional, following the lead of the U.S. Supreme Court's similar clarification of its prior overuse of the term "jurisdictional." In fact, in the recent decision of *Union Pacific R. Co.* (cited previously) the U.S. Supreme Court rendered another such decision in a case involving an agency's treatment of a statutory requirement as jurisdictional. Specifically, the Court considered and reversed orders issued by a federal agency (the NRAB) dismissing multiple proceedings for lack of jurisdiction because a party had failed to comply with a requirement to demonstrate that an informal conference had taken place before filing the proceeding.

The U.S. Supreme Court unanimously held that the requirement was not jurisdictional, using reasoning is quite similar to this Court's reasoning in *Davis*:

> Recognizing that the word "jurisdiction" has been used by courts, including this Court, to convey "many, too many, meanings," *Steel Co. v. Citizens for Better Environment*, 523 U. S. 83, 90 (1998) (internal quotation marks omitted), we have cautioned, in recent decisions, against profligate use of the term. Not all mandatory "prescriptions, however emphatic, are . . . properly typed jurisdictional," we explained in *Arbaugh v. Y & H Corp.*, 546 U. S. 500, 510 (2006) (internal quotation marks omitted). Subject-matter jurisdiction properly comprehended, we emphasized, refers to a tribunal's "power to hear a case," a matter that "can never be forfeited or waived." *Id.*, at 514 (quoting *United States v. Cotton*, 535 U. S. 625, 630 (2002)).

> For example, we have held nonjurisdictional and forfeitable the provision in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., requiring complainants to file a timely charge of discrimination with the Equal Employment Opportunity Commission (EEOC) before proceeding to court. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). We have also held nonjurisdictional and forfeitable the Title VII provision exempting employers who engage fewer than 15 employees. *Arbaugh*, 546 U. S., at 503, 515–516.
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> [T]he conference requirement is stated in the "[g]eneral duties" section of the RLA, §152, a section that is not moored to the "[e]stablishment[,] . . . powers[,] and duties" of the NRAB set out next in §153 First. Rooted in §152 and often informal in practice . . . conferencing is surely no more "jurisdictional" than is the presuit resort to the EEOC held forfeitable in *Zipes*, 455 U.S., at 393. And if the requirement to conference is not "jurisdictional," then failure initially to submit proof of conferencing cannot be of that genre.
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> * * *
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> By refusing to adjudicate cases on the false premise that it lacked power to hear them, the NRAB panel failed "to conform, or confine itself," to the jurisdiction Congress gave it. We therefore affirm the judgment of the Court of Appeals for the Seventh Circuit [setting aside the NRAB's dismissal orders].

Union Pacific, 130 S.Ct. at 596-599; 175 L. Ed. at 443-446; *see also Adkison v. Commissioner of Internal Revenue*, 592 F.3d 1050, 1054 (9th Cir. 2010) (Ninth Circuit Court of Appeals, relying on the holding in *Union Pacific*, concluded that it was "reluctant to read limitations on jurisdiction into a statutory scheme that does not clearly divest a court of jurisdiction.").

In addressing a party's internal appeals within the federal Department of Labor, one federal court of appeals recently read *Union Pacific* as holding that "[r]ules of administrative procedure" are always claim-processing rules. *Fleszar v. U.S. Dept. of Labor*, 598 F.3d 912, 914 (7th Cir. 2010). That approach is consistent with the trend away from jurisdictional requirements, which the U.S. Supreme Court has been strongly continuing.[6]

The 14-day time period here is not jurisdictional, and the HRC was required to consider the merits of BNSF's request for extension. The District Court, like the Court in *Davis*, had the authority and obligation to require the HRC to exercise the discretion it has. BNSF requests this Court reverse the District Court's order dismissing BNSF's Petition and hold that the 14-day time period is not "jurisdictional," but is a time period that can be altered at the HRC's discretion.

D. The District Court's Errors Regarding BNSF's Petition Contributed to the District Court's Granting of the Cross Petitions to Enforce and Final Judgment.

The District Court's view of BNSF's Petition and its decision to dismiss it for lack of jurisdiction contributed directly to the District Court's granting of the Department's and Cringle's petitions to enforce the Hearing Officer's Decision and

[6] *See Morrison v. National Australia Bank Ltd.*, --- S. Ct. ---, 2010 WL 2518523, *4 (June 24, 2010) (whether securities fraud statute reached or did not reach extra-territorial conduct was not a jurisdictional matter); *United Student Aid Funds, Inc. v. Espinosa*, 130 S.Ct. 1367, 1376 n.9 (2010) (180-day time limit for a party to seek revocation of a Chapter 13 bankruptcy plan confirmation order not jurisdictional); *Reed Elsevier, Inc. v. Muchnick*, 130 S.Ct. 1237, 1243-1249 (2010) (citing and discussing numerous cases and reiterating the distinction between jurisdictional and non-jurisdictional requirements).

enter a final judgment against BNSF. Had the Court not dismissed BNSF's Petition and granted BNSF the relief it sought, it would have remanded the matter to the HRC where the administrative-review process would have continued. Accordingly, BNSF also seeks a reversal of the District Court's rulings granting the cross petitions to enforce and entry of a final judgment, both of which will be rendered premature based on the relief the Court should grant concerning the District Court's disposition of BNSF's Petition. Those matters should await the additional administrative review that should take place pursuant to the arguments above. Further, with regard to the Department's cross petition, which the District Court granted without allowing BNSF to respond, the Court should instruct the District Court that as a matter of basic due process the respondent in such proceedings must be given an opportunity to respond prior to its granting of such cross petitions.

VI. CONCLUSION

BNSF timely sought review of the HRC's October 5, 2009, Dismissal Order from the one judicial body capable of review — the District Court. The District Court's confusion, largely precipitated by the misleading arguments of Cringle and the Department, led the Court to incorrectly conclude that since BNSF has not at this time exhausted its administrative remedies in regard to the Hearing Officer's Decision, BNSF's Petition should be dismissed. As has been explained, BNSF is

not seeking review of the Hearing Officer's Decision at this time and BNSF has exhausted its administrative remedies regarding the Dismissal Order.

Additionally, recent Federal and State case law strongly supports the proposition that the 14-day time period is not jurisdictional. As a non-jurisdictional time period, the HRC should have considered the merits of BNSF's notice of appeal and extension request. And, the District Court had the authority and obligation to order the HRC to do so.

This Court should reverse the District Court's dismissal of BNSF's Petition, hold that the 14-day time period is not "jurisdictional" but capable of extension, and instruct the District Court to conduct further proceedings or to remand this matter to the HRC to decide under its normal procedural rules whether to extend the period. At that point, the District Court's rulings granting the cross petitions for enforcement and its entry of a final judgment against BNSF will become premature and therefore should also be reversed.

DATED this 7th day of July 2010.

HEDGER FRIEND, P.L.L.C.

By:_____

Benjamin O. Rechtfertig
Attorney for BNSF Railway Company

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing upon the individual(s) listed below by the following means:

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DATE: July 7, 2010

Benjamin O. Rechtfertig

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Opening Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Office Word 2007, is not more than 10,000 words, including all text, excluding certificate of service and certificate of compliance.

Dated this 7th day of July, 2010.

Benjamin O. Rechtfertig